IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***A. J. Ptashnik***
LEAH ANN KAMER	)	*on his own behalf*
	)	*(via videoconference)*
	)	
(Petitioner) Respondent	)	***L. A. Kamer***
	)	*on her own behalf*
- and -	)	*(via videoconference)*
	)	
	)	*Appeal heard and*
ANTHONY JOHN PTASHNIK	)	*Decision pronounced:*
	)	***June 16, 2020***
	)	
(Respondent) Appellant	)	*Written reasons:*
	)	***June 29, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, all appeals are heard remotely by videoconferencing until further notice.

On appeal from 2019 MBQB 117

CAMERON JA (for the Court):

Introduction and Background

[1] The respondent appeals a final order made by the trial judge after a trial in the Court of Queen's Bench (Family Division). He also filed a motion to introduce fresh evidence regarding his ground of appeal dealing with the division of his pension. At the hearing, we dismissed the motion for fresh

evidence, as well as the appeal, with reasons to follow. These are those reasons.

[2] This matter has been pending since 2008 when, shortly after the parties separated, the petitioner filed for a divorce. The facts—underlying the arduous route to the trial in January 2019 and explaining, in part, the 35 grounds of appeal that are the subject of this proceeding—are thoroughly canvassed in the decision of the trial judge, as well as in the decision of the motion judge who had conduct of the interim motions in these proceedings (the motion judge) (see 2013 MBQB 183 (*Ptashnik 2013*)). We would rely on those facts and need not repeat them here, except to give some context to the appeal.

Procedural Fairness and Bias

[3] At the outset, it is important to note that many of the respondent's arguments are founded on allegations of procedural unfairness, partiality and bias on the part of the motion judge and the trial judge. Indeed, the respondent unsuccessfully asked both judges to recuse themselves from hearing these proceedings. The allegations of partiality and bias were repeated a number of times throughout the trial and this appeal.

[4] We have reviewed the proceedings, commencing from the original interim order pronounced by the motion judge on June 18, 2008. In our view, the claims made by the respondent are unfounded. While we do not intend to examine every complaint of procedural unfairness or bias in these reasons, we will give two examples.

[5] First, the fact that the motion judge denied the respondent's request to adjourn the proceedings that led to the June 18, 2008 interim order did not constitute procedural unfairness or bias. Regarding procedural fairness, the motion judge specifically stated that the interim order would be reviewable by him on motion by either party once more extensive materials had been filed. Furthermore, nothing in the proceedings indicates bias as explained by the Supreme Court of Canada in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 20-26, and the respondent has not met the high burden placed upon him to rebut the strong presumption of judicial impartiality in that regard.

[6] Second, the respondent complains that the trial judge was not impartial by displaying an abusive tone, unbecoming behaviour and ill temper towards him. Our review of the proceedings shows that, while there were times when the trial judge had to be firm with the respondent in order to maintain control over the proceedings, he did not display bias.

[7] In addition, contrary to the respondent's claims of bias on the basis that the trial judge refused to admit some evidence that he wished to call, we would note that the trial judge provided reasons for the evidentiary rulings that he was required to make during the hearing. Most of the time, the evidence that the respondent wished to enter was irrelevant. The fact that the respondent does not agree with the rulings of the trial judge does not amount to bias.

[8] The remaining grounds of appeal, as we can discern them from the notice of appeal, can be disposed of summarily.

Interim Custody of the Child and the Respondent's Motion for Contempt Against the Petitioner

[9] At the time of the trial, the only child of the marriage, born in February 2001 (the child), had turned 18 years of age. Therefore, periods of care and control were no longer at issue. Nonetheless, the respondent maintains that the motion judge erred when he provided that the respondent have supervised periods of care and control in the June 18, 2008 interim order. He maintains that the motion judge erred in determining that the interim order was in the best interests of the child and it was responsible for destroying his relationship with his son.

[10] The facts are undisputed that, shortly after the June 18, 2008 interim order, the parties struggled with the question of mutually agreeable supervisors for the respondent's periods of care and control. In response to the situation, the respondent sent a letter to the petitioner asking her to tell the child that he would not be seeing him until "this is all over" (*Ptashnik 2013* at para 21). At that time, the child was seven years and five months of age.

[11] In *Ptashnik 2013*, when denying the respondent's motions for recusal and *Charter* relief regarding the order of supervised care and control (see the *Canadian Charter of Rights and Freedoms*), the motion judge noted that the respondent, as of that time, had not seen the child since 2008 (see para 22).

[12] The respondent's allegation of contempt arises from the fact that, after several years of no contact between the respondent and the child, the parties agreed to attempt therapeutic restoration of the relationship between the respondent and the child, who was then in his early teens. The respondent

argued that, during this time, the petitioner provided some documentation to the child, in contravention of the June 18, 2008 interim order, which prohibited both parties from speaking to the child about anything relative to the family proceeding or their separation or divorce. The petitioner maintained that, when she provided the child with the documentation, she did so acting on the express instructions of the therapist.

[13] In declining to exercise his discretion to find the petitioner in contempt, the trial judge noted that proof of the fact that the disclosure undermined the prospect of reconciliation would have required the evidence of a "non-compellable" witness (at para 104). Even then, he questioned whether the act constituted contempt or whether a finding of contempt would serve any purpose. He stated that "rehashing an incident several years past" (at para 106) would not help the parties obtain the closure that they needed.

[14] It is trite law that discretionary orders are entitled to deference and that appellate intervention is only justified if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice (see *Elsom v Elsom*, [1989] 1 SCR 1367 at 1375).

[15] In our view, the respondent has shown no such error. The issue was dated and unrelated to the issues that required determination in the trial.

Child Support, Section 7 Expenses and Continuing Support of the Child

[16] At the trial, the petitioner asked the Court, for the purposes of calculating child support, to impute income to the respondent from 2008-2011 on the basis that the respondent was intentionally underemployed during that time.

[17] The respondent stated that he had "valid periods of 'sick time' or 'leaves of absence'" (at para 46).

[18] The trial judge reviewed all of the petitioner's arguments as to why the respondent was not credible in his assertions. He then carefully considered all of the facts surrounding the time when the respondent took leaves from his work. Those facts included, among other things, medical reports and an email that the respondent sent to the petitioner in November 2008, wherein he told her that he was taking an extended leave of absence without pay with the intent of devoting all of his time and energy to regaining his parenting rights and in order to represent himself in the proceedings. He stated that he would not go back to work until the matter had been resolved to his satisfaction.

[19] The trial judge found the respondent's credibility to be lacking. He concluded that there was no question that the respondent was intentionally underemployed during the period in question. He recalculated the appropriate child support owing based on the respondent's earnings from his income tax return based on the average between his 2008 and 2012 salaries (see paras 48-52).

[20] The credibility findings made by a trial judge are to be afforded great deference by an appellate court. They are not to be interfered with absent a palpable and overriding error (see *R v Gagnon*, 2006 SCC 17 at para 20).

[21] An appellate court should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong (see *Hickey v Hickey*, [1999] 2 SCR 518). This standard is also applicable to retroactive support orders (see *Graham v Graham*, 2013 MBCA 66).

[22] We are not persuaded that the trial judge erred in his careful consideration of the credibility of the respondent and the resulting imputation of income and order of retroactive child support. The evidence supports his findings.

[23] The petitioner claimed section 7 expenses (see the *Divorce Act* at section 7) up until the time the child turned 18, which were awarded by the trial judge. At the trial, the respondent asserted that he should not have to contribute to these expenses because he had no input into the decisions and he was alienated from the child.

[24] In reaching his conclusion, the trial judge commented that the respondent gave evidence undermining the child's abilities. He found that this supported the theory that the respondent withdrew from the child's life for selfish reasons and abdicated his right to consultation on decision-making. He found that the petitioner had proven her section 7 claims and that the respondent had the financial responsibility to pay for his proportionate share.

[25] We see no palpable and overriding error that would justify this Court's intervention regarding the section 7 expenses.

[26] Regarding the finding of the trial judge that the child was still a child of the marriage and that support should continue, the respondent argues that the trial judge erred in rejecting his argument that, based on alienation and the fact that the child had turned 18, the child should not continue to be considered a child of the marriage for support purposes.

[27] There was no question that, when he reached the age of 18, the child was in the process of completing his final term in high school. At the date of

the trial, he was registered for full-time attendance at university and continued to reside with the petitioner. Relying on *Starr v Starr*, 2008 MBQB 305, the trial judge agreed that the relationship existing between a parent and child should have no bearing on the obligation to pay support. In any event, he found that the child had not met the "selfish or ungrateful" or "extremely grave" circumstances that would justify non-payment of support to an adult child of the marriage as set out in *Rebenchuk v Rebenchuk*, 2007 MBCA 22 at para 56.

[28] Again, the findings of the trial judge are entitled to deference on appeal and we are not persuaded that the respondent has shown any palpable and overriding error on the part of the trial judge.

Spousal Support (Ordered Against and Claimed by the Respondent)

[29] The respondent requested that the trial judge "delete" the spousal support (at para 93) that he had been ordered to pay to the petitioner in the June 18, 2008 interim order. It was his theory that the petitioner had been generating undisclosed revenues during their marriage.

[30] The trial judge carefully considered the reasons underlying the June 18, 2008 interim order for spousal support and found that it was appropriate based on the fact that the petitioner was a "stay at home Mom" (at para 90) with the intent that she return to work when the child entered Grade 1. He noted the discrepancy in income between the parties at the time of separation. He commented that, based on the Spousal Support Advisory Guidelines, the petitioner would have been entitled to spousal support in the range of six to 12 years, and that she agreed to its termination after three years. He rejected the respondent's argument, noting that it was largely irrelevant

and emphasising that it was the respondent who did the petitioner's taxes prior to the separation.

[31] We are not convinced that the trial judge committed any palpable and overriding error in dismissing the respondent's request.

[32] The trial judge refused to hear additional evidence from the respondent regarding the issue and dismissed his claim for retroactive and ongoing spousal support. In his view, the issue was a non-starter. In his reasons, he noted that the respondent continued to enjoy stable employment with the Government of Canada and had suffered no impairment in his earnings since the separation. Further, the respondent had no entitlement to spousal support at the time of separation. While he noted that the petitioner's career had progressed to the point that she earned more money than the respondent, that situation, if material, occurred post-separation and did not give rise to a support obligation.

[33] We are not convinced that the trial judge made any palpable and overriding error in his determination. As to his refusal to allow the respondent to call additional evidence, we are of the view that he was under an obligation to maintain control over the proceedings and prevent the admission of irrelevant evidence on an issue that had no chance of success.

Moving, Home Repair and Sale of the Respondent's Vehicle

[34] Most of these issues relate to the sale of the family home pursuant to an order of partition or sale that the petitioner received pursuant to *The Law of Property Act*, CCSM c L90. The respondent did not appeal the sale order. The trial judge rejected the respondent's claim that he was denied the

opportunity to purchase the home, finding that the time to propose alternatives must predate any final order of sale and that the respondent participated in the sale by accepting the third-party offer.

[35] The trial judge accepted the evidence and documentary proof of the petitioner that, after the sale, the respondent was unwilling to remove his personal assets on a timely basis. He awarded the petitioner costs incurred for moving and storing of the assets.

[36] He also awarded her a modest amount to replace a window that was required to be repaired under the offer to purchase the home, and for some minor finishing issues that were recommended to be completed before the house was placed for sale.

[37] Finally, the trial judge denied the respondent's claim of damages for a vehicle, which he had left on the family property. The trial judge found that the petitioner had given the respondent various forms of notice to remove the vehicle before she had it towed to a compound where it was eventually sold for storage costs. In reaching his conclusion, the trial judge found the respondent's evidence to be inconsistent and lacking in credibility.

[38] We are not convinced that the trial judge made any palpable and overriding error in his factual findings or in his application of the law to the facts with regard to any of the above issues related to the sale of the house or the car. His credibility findings are entitled to deference.

Pension Division Calculation

[39] The respondent has filed a motion to adduce fresh evidence regarding this appeal. He asks that this Court admit as fresh evidence a letter from the Government of Canada Pension Center, sent to him after the trial, regarding an application by the petitioner for the division of his pension entitlements under his public service pension plan. In his view, the letter supports his assertion that the trial judge erred in ordering that the sum of $126,610 be transferred from his pension to the petitioner. He says the trial judge misapprehended the evidence of the two expert witnesses and ordered the transfer of an amount representing the entire capitalized value of the pension that accrued during the marriage, rather than one-half of that value.

[40] We denied the respondent's motion. The letter in question is not of any evidential value and is of no assistance in determining whether the trial judge erred in reaching his conclusion.

[41] Regarding the division of the respondent's pension, the trial judge noted that the parties had agreed on the period of cohabitation. Each party submitted actuarial reports and the makers were called primarily for cross-examination purposes. He stated that the actuaries agreed that the only two areas of difference between them were the "anticipated retirement age" and the 'interest factor' to be applied given the passage of 11 years since the date of separation" (at para 28).

[42] After considering the testimony of each of the witnesses, the trial judge accepted the evidence of the petitioner's witness that the "retirement age assumption" (at para 30) should be 60 years of age, as opposed to the respondent's witness that it should be 65 years of age.

[43] The decision of whether to prefer the evidence of one expert over another is reviewed on the standard of palpable and overriding error (see *Posthumus v Foubert*, 2011 MBCA 43 at paras 4, 21). As long as there is some evidence to support the preferences of the trial judge, this Court will not interfere (see *Laurie v Parham*, 2010 MBCA 62 at para 23).

[44] In this case, the trial judge gave careful reasons for accepting the evidence of the petitioner's witness. He noted that her witness's calculations were based on the actual methodology as prescribed by the Canadian Institute of Actuaries Standards of Practice and that he identified both the established and expected ages of retirement within the respondent's pension plan. He determined that, statistically, the actual average age of retirement in the specific department where the respondent was employed was below the age of 60.

[45] On the other hand, the trial judge noted that the respondent's witness admitted that he did not use the prescribed methodology or established rates under the respondent's pension plan. Rather, he employed the "non-standard ages" (at para 32) that he was directed to use by the respondent.

[46] Similarly the trial judge accepted the opinion of the petitioner's witness regarding potential growth, noting that the report of the respondent's witness did not address the issue, but that his testimony employed hindsight contrary to *Best v Best*, [1999] 2 SCR 868.

[47] There is no merit to the respondent's argument that the trial judge ordered the transfer of a sum representing the entire capitalized value of the pension rather than one-half. A review of the trial transcript shows that the trial judge accepted the opinion of the petitioner's witness that her one-half

share of the pension was valued at $80,299 at the date of separation in 2008. The difference between this amount and the sum ordered represents interest calculated over the more than ten years it took for the matter to get to trial.

[48] In our view, there was evidence to support the findings of the trial judge regarding the expert testimony regarding each of the two issues and we would not interfere with his rulings.

Reversal of Costs Awarded Upon the Finding of Contempt by the Motion Judge

[49] The trial judge dismissed the respondent's request to reverse an interim order of costs made against him by the motion judge resulting from finding that the respondent was in contempt of the June 18, 2008 interim order. The trial judge noted that a finding of contempt is a final, not interim, order subject to review at the trial. In any event, he stated that it would not be appropriate for reason of the passage of time to embark on a review of the motion judge's finding.

[50] We are not convinced that the trial judge committed any palpable and overriding error in reaching this discretionary conclusion.

Conclusion and Decision

[51] At the commencement of his reasons for decision, the trial judge wrote, "This case is an example of a matter that has gotten away under the old model for Family Division proceedings" (at para 1). He repeatedly commented on the length of time that the litigation took and emphasised that it was necessary for it to end. We agree.

[52] For all of the above reasons, the respondent's fresh evidence motion and his appeal were dismissed with costs to the petitioner in the amount of $1,000.

"Cameron JA"

"Pfuetzner JA"

"leMaistre JA"